

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

**ROBERT O’LEARY and** )  
**DAVID GUALCO** ) CIVIL ACTION NUMBER  
 )  
Plaintiffs ) 10C-03-108-JOH  
 )  
v. )  
 )  
**TELECOM RESOURCES SERVICE,** )  
**LLC, NAL WORLDWIDE, LLC, LAKE** )  
**CAPITAL MANAGEMENT, LLC,** )  
**PAUL SAN MIGUEL and JOHN O’BRIEN** )  
 )  
Defendants )  
 )

*Submitted: April 20, 2011*

*Decided: July 25, 2011*

**MEMORANDUM OPINION**

*Upon Motion of Defendant Lake Capital Management,  
LLC to Dismiss Plaintiffs’ First Amended Complaint - **GRANTED***

***Appearances:***

Douglas B. Catts, Esquire, and Kathryn J. Garrison, Esquire, of Schmittinger & Rodriguez, Dover, Delaware, Attorneys for Plaintiffs

Philip A. Rovner, Esquire, and Jonathan A. Choa, Esquire, of Potter Anderson & Corroon, Wilmington, Delaware, and Terrence J. Dee, Esquire, and Jordan M. Heinz, Esquire, of Kirkland & Ellis, Chicago, Illinois, Attorneys for the Defendants

HERLIHY, Judge

Defendant Lake Capital Management, LLC (“Lake”) has moved to dismiss plaintiffs O’Leary and Gualco’s (“plaintiffs”) claim against it claiming fraudulent inducement involving the sale of plaintiffs’ business.

*Facts*

Plaintiffs sold their business, Telecom Resource Service, LLC (“TRS”) to TRS Acquisition, LLC (“TRSA”). TRSA was created by co-defendant in this action, NAL Worldwide, LLC to purchase plaintiffs’ business. The agreement of sale was consummated in an Asset Purchase Agreement (“APA”). Plaintiffs each signed a Senior Management Agreement (“SMA”) with TRS, which kept them on in executive positions at TRS.

The plaintiffs have claimed they were wrongfully terminated and brought an action here against various defendants. Their original cause of action is outlined in an earlier opinion of this Court.<sup>1</sup> Lake was a named defendant in several counts in plaintiffs’ complaint, namely Breach of the SMAs, Bad Faith, Breach of Contract (APA), and Outrageous Conduct Causing Severe Emotional Distress. In the same earlier opinion, the Court dismissed all of plaintiffs’ original claims against Lake.<sup>2</sup>

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<sup>1</sup> *O’Leary v. Telecom Resource Service, LLC*, 2011 WL 379300 (January 14, 2011, Del. Super.).

<sup>2</sup> *Id.*

Subsequently, plaintiffs amended their complaint to add a claim of Fraudulent Inducement against Lake. It is that new claim which Lake moves to dismiss. To analyze this additional claim and Lake's motion to dismiss, a brief recitation of the specific allegations against Lake is necessary.

Lake was the parent company of NAL at the time of NAL's acquisition of plaintiffs' telecommunications company, TRS. Plaintiffs claim that Lake's Director Ted Kovas ("Kovas") sent them the initial letter of intent to purchase TRS on behalf of NAL, and negotiations for the requirements of sale were quickly commenced by Kovas.<sup>3</sup> Plaintiffs also allege that Lake drafted the APA and SMAs, and all other agreements used by NAL to purchase TRS. They also allege that Lake officials, agents, and employees assisted in the negotiation and performed the due diligence for the sale.<sup>4</sup> Plaintiffs claim that on July 21, 2007, they met with Kovas at the NAL Headquarters in Addison, Illinois. At this meeting, they allege that Kovas offered, on Lake's behalf, "an 'Open Check Book' for the growth of TRS and promoted personal financial gain for plaintiffs if they capitalized on the strategic opportunities that existed between TRS and NAL" combined with Lake's financial backing.<sup>5</sup>

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<sup>3</sup> Compl. ¶86.

<sup>4</sup> Compl. ¶86b.

<sup>5</sup> Compl. ¶86d.

Both NAL and Lake allegedly conducted a due diligence review of TRS. Plaintiffs claim that within these documents and account statements was a detailed list of all of TRS' inventory assets being sold, including a variety of used Ericsson equipment. Lake employee Doug Troy, reviewed the financial records of TRS and composed a financial report as part of due diligence.<sup>6</sup> Additionally during negotiations, NAL and Lake removed the word "reselling" from the description of TRS' business in a draft preamble to the APA. Plaintiffs allege that they told Lake and NAL in an email on August 11, 2007, and by other means, that this aspect of the business should be included in the description.<sup>7</sup> The preamble was revised, and the final version stated that TRS was in "the business of providing test, repair and engineering services, including the consignment or purchase and resale of telecommunications equipment, for network operators principally to customers in the telecommunications industry."<sup>8</sup>

Doug Witt, a director and President/CEO of NAL, who had been NAL's representative in the negotiations, went on vacation on August 3, 2007, and asked plaintiffs to finish the negotiations with Kovas and Gwen Hassan, NAL's general counsel.<sup>9</sup>

Plaintiffs' complaint also alleges:

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<sup>6</sup> Compl. ¶87.

<sup>7</sup> Copml. ¶88.

<sup>8</sup> Compl. ¶89.

<sup>9</sup> Compl. ¶86a.

90. Glenn O'Brien, the Vice President of Sales for NAL represented to Plaintiff Gualco to the purchase of TRS in 2007 that its purchase and the operation of TRS did not constitute a breach of any material contract to which NAL was a party. This representation was repeated in Article IV of the APA, which was signed by Doug Witt, the President and CEO of NAL on behalf of both TRS Acquisition LLC and NAL, which was also reviewed by Lake during negotiations.

\* \* \* \* \*

92. NAL, TRS Acquisitions LLC and LAKE knew that Plaintiffs were engaged in the business of reselling telecommunications equipment and that TRS would continue to engage in the business of reselling telecommunications equipment after the purchase.

93. NAL, TRS Acquisitions and Lake knew that Plaintiffs had numerous pieces of used Ericsson equipment in the inventory NAL was purchasing from TRS.

94. Upon information and belief, one of NAL's biggest clients at the time of the purchase was Ericsson, and as part to their relationship, NAL was obligated to either destroy (i.e. not resell or recycle or scrap) Ericsson equipment, or that prohibited NAL from competing with Ericsson's business.

95. Plaintiffs were not informed of the terms of any contract NAL had with Ericsson or any "key customer", nor were they informed that their resale business would conflict with any NAL contracts or relationships with customers.

96. NAL and Lake intentionally, wantonly, willfully and/or recklessly made representations to Plaintiffs that NAL's purchase of TRS did not conflict with or constitute a material breach of any material contract to which it was a party. They made those representations with the knowledge or with reckless indifference to the fact that they were false, in conscious disregard as to the truth, and to the impact that the truth would have on Plaintiffs.

97. NAL and Lake made this representation to Plaintiffs with the intention that they would rely on it and to induce them to sell TRS to NAL.<sup>10</sup>

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<sup>10</sup> Compl. ¶¶90, 92-97.

### *Parties' Contentions*

Plaintiffs assert that Lake's intimate knowledge of the substance of plaintiffs' business, and heavy due diligence involvement means that it knew TRS was reselling Ericsson equipment. Additionally, they assert that Lake drafted the APA and SMAs which included the resale provisions. Plaintiffs also argue that they asked multiple NAL and Lake employees whether the resale aspect of TRS would conflict with any existing contracts, and those employees replied in the negative.<sup>11</sup> Lake, plaintiffs' claim, also reviewed the final contracts, which included provisions about the resale business.<sup>12</sup> Plaintiffs were fired, in part, for allegedly reselling Ericsson equipment in violation of a contract that NAL had with Ericsson. Plaintiffs assert that both Lake and NAL knew plaintiffs were engaged in the business of reselling telecommunications equipment, that this would violate a contract NAL had with Ericsson, yet induced them into signing a contract which they knew plaintiffs would ultimately violate.<sup>13</sup>

Lake claims that plaintiffs have not alleged this claim of Fraudulent Inducement with the necessary specificity which Superior Court Civil Rule 9(b) requires to survive a motion to dismiss.<sup>14</sup> They also argue that plaintiffs cannot rely on an agency theory

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<sup>11</sup> Compl. ¶91. Specifically, plaintiffs named Glenn O'Brien and Doug Witt.

<sup>12</sup> Compl. ¶90.

<sup>13</sup> Pls.' Resp. at 3, ¶2; Compl. ¶91-95.

<sup>14</sup> Lake M. to Dismiss at 2.

because they have not alleged sufficient control over NAL by Lake to support a claim for corporate veil piercing.

### *Applicable Standard*

In a motion to dismiss, all well-pled allegations are taken as true.<sup>15</sup> A motion to dismiss for failure to state a claim upon which relief can be granted made pursuant to Superior Court Civil Rule 12(b)(6) will not be granted if the plaintiff may recover under any conceivable set of circumstances susceptible of proof under the complaint.<sup>16</sup> All reasonable inferences shall be made in favor of the non-moving party, but the Court need not blindly accept as true all allegations nor draw all inferences in the plaintiff's favor unless reasonable.<sup>17</sup>

### *Discussion*

#### *Particularity Standard*

A fraudulent inducement claim under Rule 9(b) must be pled with particularity.<sup>18</sup> The purpose of Rule 9(b) is to ensure that a defendant is put on sufficient notice to allow it to defend itself against the allegations.<sup>19</sup> A complaint satisfies the specificity requirement

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<sup>15</sup> *Lord v. Souder*, 748 A.2d 383, 398 (Del. 2000).

<sup>16</sup> *Id.*

<sup>17</sup> *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896 (Del. 2002); *White v. Panic*, 738 A.2d 543, 549 (Del. 2001).

<sup>18</sup> *MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455 at \*15 (Del. Ch.).

<sup>19</sup> *Chesapeake & Potomac Tel. Co. v. Chesapeake Utils Corp.*, 436 A.2d 314, 338 (Del. (continued...))

when it identifies the time, place, content, and speaker of the alleged false representations.<sup>20</sup> In Delaware, the particularity standard is more relaxed in cases involving breaches of duty caused by omission or inaction, where the allegations involves negligence.<sup>21</sup> “The courts also recognize, however, that the purpose of the particularity standard is to alert the defendant to potential liability and that it is insufficient to merely make a general statement of the facts which admits of almost any proof to sustain it.”<sup>22</sup>

Failure to disclose a fact that a person knows “may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented nonexistence of the matter that he has failed to disclose,” and a party may be liable for such omissions “when it has a duty to exercise reasonable care to disclose the matter in question.”<sup>23</sup> Section 551 of the Restatement (Second) of Torts also provides: “One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose if, but only if, he is under a duty to the other to

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<sup>19</sup>(...continued)  
1981).

<sup>20</sup> *Rinaldi v. Iomega Corp.*, 1999 WL 1442014 at \*8 (Del. Super.).

<sup>21</sup> *Browne v. Robb*, 583 A.2d 949, 953 (Del. 1990).

<sup>22</sup> *Id.* (internal citations omitted).

<sup>23</sup> Restate (Second) of Torts, § 551(1).

exercise reasonable care to disclose the matter in question.”<sup>24</sup> The question of whether a duty exists, while a mixed question of law and fact, is for the Court to decide as a matter of law.<sup>25</sup>

Legal duties arise from relationships. At the heart of Section 551 is a recognition that certain “business” relationships which evolve in the context of “business transactions[s]” can give rise to a duty of complete disclosure. Restatement (Second) of Torts 552(1) speaks in terms of disclosures made in the context of a transaction in which the speaker has a “pecuniary interest.” Delaware common law embraces a “pecuniary duty to provide accurate information.” In each instance, the law contemplates that a duty of disclosure will arise when the parties are in the midst of a “business relationship” from which they expect to derive “pecuniary” benefits. Thus, while contractual privity may not be required to form a duty, something more than a casual business encounter must be demonstrated before a duty of care will be imposed.<sup>26</sup>

Plaintiffs have alleged a number of particular facts regarding Lake acting through its own people. Their allegations show a reasonably involved participation by Lake in the negotiations and events leading up to the execution of the APA. They assert Lake drafted the APA but that assertion is unattributed. Lake was not a signatory to the APA.<sup>27</sup>

As noted, when plaintiffs make claims of fraud or fraudulent inducement they are required to specify the time, place, content and speaker. An examination of plaintiffs

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<sup>24</sup> Restatement (second) of Torts, §551.

<sup>25</sup> *Naidu v. Laird*, 539 A.2d 1064, 1070 (Del. 1988).

<sup>26</sup> *Outdoor Techs., Inc. v. Allfirst Fin., Inc.*, 2001 WL 541472 at \*5 (Del. Super.)(citations omitted).

<sup>27</sup> Defendants Telecom Resource Service, LLC and Syncreon Tenchonolgy (USA) LLC’s (formerly NAL) Motion for Partial Summary Judgment, April 2, 2011, Exhibit A.

claim in paragraphs 96 and 97 meet none of those requirements, but instead read as follows:

96. NAL and Lake intentionally, wantonly, willfully and/or recklessly made representations to Plaintiffs that NAL's purchase of TRS did not conflict with or constitute a material breach of any material contract to which it was a party. They made those representations with the knowledge or with reckless indifference to the fact that they were false, in conscious disregard as to the truth, and to the impact that the truth would have on Plaintiffs.

97. NAL and Lake made this representation to Plaintiffs with the intention that they would rely on it and to induce them to sell TRS to NAL.

In these paragraphs, particularly paragraph 96, where their fraud claim is an "active" one, not one of having a duty to speak but failing to do so, that plaintiffs fail to meet the particularity requirements. By comparison, paragraph 95 is their claim of Lake allegedly having a duty to disclose but failing to do so:

95. Plaintiffs were not informed of the terms of any contract NAL had with Ericsson or any "key customer", nor were they informed that their resale business would conflict with any NAL contracts or relationships with customers.

While there could be a relaxed standard where passive fraud is alleged, and this Court is not deciding that, this allegation remains too general. For all that currently is known since the Ericsson contract was with NAL, not Lake, any duty to disclose was that of NAL's. After all, it was their people doing the work and inspections.<sup>28</sup>

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<sup>28</sup> See Complaint ¶ 94.

Plaintiffs are bootstrapping NAL's knowledge onto its parent, Lake. They have not supplied names, times or places of the affirmative misrepresentations alleged in their paragraph 96. As far as that paragraph is concerned, Plaintiffs have failed to meet the heightened pleading requirements in Rule 9(b). Assuming that there might be a relaxed standard for claims of fraud where silence is alleged when there is a duty to speak, paragraph 95 is still too broad and non-specific. Plaintiffs, even with the allegations of involvement of Lake personnel in some of the pre-contract events, have simply not put Lake on notice as to its duty, as distinct, for instance, from that of NAL. Paragraph 95, viewed even in context does not satisfy the requirements of Rule 9(b).

Plaintiffs also argue in the Fraudulent Inducement Count, seek to tag NAL as Lake's agent. This Court's earlier decision disposed, adversely to plaintiffs, that effort. The totality of the pleadings in this Court still do not meet the requirements needed to attach potential liability on Lake, a distinct corporation. The reasons this Court gave earlier remain.<sup>29</sup>

### *Conclusion*

For the reasons stated herein, defendant Lake Capital Management LLC's motion to dismiss Count II, Fraudulent Inducement, is **GRANTED**.

**IT IS SO ORDERED.**

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J.

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<sup>29</sup> *O'Leary v. Telecom Resource Service, LLC*, 2011 WL 379300 (Del. Super.).